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No. 92-233

In the Supreme Court of the United States

OCTOBER TERM, 1992

S.M.A. HASAN,
PETITIONER,

v.

LYNN MARTIN, SECRETARY OF LABOR,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION AND BRIEF AMICUS CURIAE IN OPPOSITION

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Dated: September 4, 1992

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QUESTION PRESENTED

Should this Court review a case based on an issue that was not reached by the court below?

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STATUTES AND RULES

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Nuclear Power Services, Inc. ("NPSI"), Stone & Webster Engineering Corp. ("Stone & Webster"), and Texas Utilities Electric Company ("TUEC") (together, the "Amici") hereby respectfully move for leave to file the attached brief amicus curiae in opposition to a grant of certiorari in the above-captioned case. The consent of the attorney for the respondent has been obtained. The consent of the petitioner was requested but refused.

The interest of the Amici in this action is that they were the party respondents in the Complaint brought by the Petitioner under the Employee Protection Provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1988).

In this case, Mr. Hasan alleged that he was blacklisted by TUEC and Stone & Webster for "whistleblowing" while working as an employee of NPSI at TUEC's Comanche Peak plant. A. 18-19.[1] Mr. Hasan was released from Comanche Peak back to his employer NPSI in August, 1985, when TUEC replaced three pipe support engineering contractors, of which NPSI was one, with a single new contractor, Stone & Webster. A. 19.[2] TUEC did not recommend that Stone & Webster hire Mr. Hasan. *Id.* Stone & Webster declined to hire Mr. Hasan in August 1985 when it took over operations at Comanche Peak, and, seeing no reason to reconsider its earlier decision, Stone & Webster also declined to hire Mr. Hasan when he again applied for employment in early 1986. *Id.* Mr. Hasan subsequently brought this action alleging that he had made safety complaints while at Comanche Peak that were the basis for TUEC's negative recommendation and Stone & Webster's subsequent decisions not to hire him. A. 20.

The Amici defended the case at trial before the Administrative Law Judge (the "ALJ"), who after hearing the case submitted a Recommended Decision and Order recommending that the case be dismissed. The Amici then argued for the Secretary of Labor's acceptance of that recommendation, which the Amici obtained on June 26, 1991 when the Secretary issued a Final Decision and Order dismissing the Complaint. The Amici also appeared as amicus curiae in the support of affirming the Secretary of Labor's decision in the Fifth Circuit. As the real parties in interest in this case, the Amici have a substantial interest in protecting the Fifth Circuit's decision affirming the Secretary of Labor's Final Decision and Order. Indeed, it is only because of the unusual procedure applicable to the

[1] This motion cites to the appendix attached to Mr. Hasan's petition as A.

[2] Mr. Hasan subsequently was laid off by NPSI because it was unable to find work for him elsewhere. A. 19.

the review of federal agency decisions that the Secretary of Labor was named as the only responding party to this case on appeal rather than the Amici, making it appropriate and helpful for this Court to consider the arguments of the Amici.[1]

Furthermore, the Amici can offer valuable assistance to this Court. As the real parties in interest in this case and the parties who defended it at trial, the Amici are capable of offering this Court the most complete picture of the facts which formed the basis of the decision below. A thorough understanding of the facts proved below will assist this Court in seeing that its review of this case is inappropriate, because the case below was decided based on the factual finding that no discrimination had occurred since safety complaints were not a motivating factor in the employers' decisions. Indeed, the ALJ found that the failure to recommend or hire Mr. Hasan was based entirely on his "chronic 'personality' problems with coworkers." A. 20, 22. Based on these facts, the Secretary of Labor expressly concluded that it was not necessary even to reach the issue with respect to which Petitioner seeks this Court's review of whether internal complaints are protected. A. 5-6 at n.3.

[1] The Fifth Circuit denied the Amici leave to intervene on the ground that their motion was untimely, but permitted the Amici to brief and argue the case as amicus curiae.

CONCLUSION

For the above-stated reasons, the Amici respectfully request that this Court grant their motion for leave to file the attached proposed brief amicus curiae in opposition to certiorari.

Respectfully submitted,

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STATEMENT OF THE CASE

This case is based on the claims of Petitioner S.M.A. Hasan under Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851. Mr. Hasan alleged that Texas Utilities Electric Company ("TUEC") and Stone & Webster Engineering Corporation ("Stone & Webster") blacklisted him because of the purported "whistleblower" activities that he allegedly engaged in at TUEC's Comanche Peak plant, while working as an employee of Nuclear Power Services, Inc. ("NPSI"), a TUEC contractor. He alleged that, as a result, Stone & Webster did not hire him in 1986, after he had been released from the plant and discharged by NPSI in the fall of 1985 because of general

lack of work in the nuclear industry.[4] The Administrative Law Judge (the "ALJ") concluded that the decision not to hire Mr. Hasan was based solely on his history of not getting along with co-workers, and the Secretary of Labor adopted that finding. After argument, the Secretary of Labor's decision was summarily affirmed by the Fifth Circuit Court of Appeals. Mr. Hasan now petitions this Court to review this case on the basis of an issue that the Secretary of Labor and the Fifth Circuit did not even deem necessary to reach, and did not reach, in deciding the case. Amici[5] respectfully submit that Mr. Hasan's petition should be denied.

1. Background.

The events leading to this action began with Mr. Hasan's release back to his then employer NPSI in August 1985. At that time, TUEC replaced all three of its pipe support engineering contractors (of which NPSI was one) with a single new contractor, Stone & Webster. A. 19.[6] In deciding which engineers to hire for continued work at Comanche Peak, Stone & Webster interviewed the engineers and considered a list of "yes, no, or maybe" recommendations from TUEC. *Id.* Mr. Hasan was one of approximately thirty engineers who were not recommended by TUEC and whom Stone & Webster decided not to hire for continued work at the plant. *Id.*

Subsequently, in October 1985, Mr. Hasan was laid off by his employer NPSI, along with a number of other engineers,

[4] Mr. Hasan did not challenge before the Secretary of Labor the ALJ's dismissal of claims based on his original release from the Comanche Peak plant and discharge from NPSI.

[5] TUEC, Stone & Webster, and NPSI are together referred to herein as the "Amici."

[6] This response cites to the appendix attached to Hasan's petition as A. It cites to the appendix in the Fifth Circuit, which contained two volumes, as AA.I or AA.II, as appropriate.

because NPSI was unable to find work for him, due to a sharp decline in nuclear plant construction. A. 19; AAI. 229-30. In February 1986, Mr. Hasan again applied to Stone & Webster to work at Comanche Peak, but was rejected on the ground that there was no reason to change the previous decision not to hire him. AAI. 270-72. After filing a series of complaints and sending a series of letters unsuccessfully alleging that he was the victim of religious and age discrimination, A. 20; AAI. 164-72, Mr. Hasan filed this case in February 1986, alleging that he was released in retaliation for whistleblowing activities at Comanche Peak.

The record clearly supports the decision below that Mr. Hasan was released based on difficulty getting along with coworkers rather than because of any purported whistleblowing activities. Prior to his release, Mr. Hasan had a long history of great difficulty interacting with his fellow engineers, dating back a number of years. Mr. Hasan himself admitted at trial his personality problems, which he attributed to perceived religious differences with Hindu co-workers, because he is a Moslem. AAI. 174-75, 183-84, 201-02; A. 20. Evidence of such problems appeared even before he came to Comanche Peak; one supervisor at the South Texas nuclear power project where he worked before coming to Comanche Peak observed that: "[Mr. Hasan] suffers from paranoia of being discriminated [against], and everybody being out to get him. This prevents him from establishing a harmonious rapport with colleagues." AAI. 161-62.

While at Comanche Peak, Mr. Hasan demonstrated substantial difficulties in working with his fellow engineers. He had confrontations with supervisors, as well as almost all of his fellow engineers, including frequent outbursts and fits of temper and a knife incident. AAI. 81-82, 194. Furthermore, he alienated his colleagues by openly stating that, while he considered himself an "excellent" engineer, his colleagues were all incompetent. AAI. 184-91; A. 21. He also complained

about petty matters, such as the claim that his office area was supposedly four inches smaller than that of his co-workers. AAI. 199. Despite these problems, TUEC made repeated efforts to find Mr. Hasan a location where he could work effectively with his fellow engineers, transferring him to three different groups of engineers during his three years at the plant. AAI. 59, 68. When confronted with the obligation of deciding which engineers to recommend to Stone & Webster, however, TUEC legitimately declined to recommend Mr. Hasan because of his long history of personality conflicts. A. 22.

2. The Decisions Below.

After hearing the evidence, the ALJ concluded that no blacklisting or discrimination had occurred, and dismissed Mr. Hasan's complaint. A. 26-27. The ALJ's holding was based on two findings. His principal finding, and that relied on by the Secretary of Labor in affirming the ALJ's opinion, was that TUEC's recommendation and Stone & Webster's decision not to hire him were based solely on his history of problems getting along with co-workers, and not even in part on any prior whistleblowing comments or threats. A. 22-23, 26. The ALJ also addressed the protected activity issue, finding that Mr. Hasan had not engaged in any protected activity while at Comanche Peak and noting that Mr. Hasan himself had not characterized his concerns as safety complaints until long after Stone & Webster declined to hire him in August 1985. A. 25.[7] The ALJ only briefly addressed the issue of whether internal complaints constitute protected activity without making it the basis for his holding, stating that "even assuming for the sake of argument that complainant's comments and threats were intended by him and understood by his employer as being safety

[7] On this point, the ALJ made credibility findings adverse to Mr. Hasan. A. 20, 22.

related" such internal threats would not constitute protected activity under the Fifth Circuit's ruling in *Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029 (5th Cir. 1984). A. 25.

In affirming the ALJ's decision, the Secretary of Labor explicitly decided that reaching the issue of whether internal complaints constitute protected activity was unnecessary. A. 5-6 at n.3. The Secretary found that the record fully supported the ALJ's finding that the Amici's actions were not motivated by discrimination, but rather solely by Mr. Hasan's personality problems. The Secretary held that dismissing Mr. Hasan's complaint was thus appropriate, whether internal complaints consitute protected activity or not. A. 5-6 at n.3; 13-14. The Fifth Circuit summarily affirmed the Secretary of Labor's decision, finding no basis for rejecting the Secretary's decision that affirmed the ALJ's decision. A. 1-2.

REASONS FOR DENYING THE PETITION

Petitioner Hasan asks that this Court grant certiorari on the ground that this case purportedly raises a split in the circuit courts of appeal, concerning whether purely internal complaints to management constitute protected activity under the Energy Reorganization Act. In fact, however, this case does not raise the issue of the split among the Circuits on the internal complaint question, because the Fifth Circuit did not render a decision here based on the issue of what constitutes protected activity. Rather, the Fifth Circuit summarily affirmed the decision of the Secretary of Labor, which held that the issue of whether internal complaints constitute protected activity need not even be addressed in this case because the substantial evidence clearly supported the ALJ's conclusion that Mr. Hasan was not recommended for hire by TUEC and not hired by

Stone & Webster "solely on the basis of his history of not getting along with co-workers." A. 5-6 at n.3; 13-14; 26.*

Because the issue of whether internal complaints constitute protected activity was not reached (and was not required to be reached) in the decision below, a grant of certiorari is inappropriate. *Upjohn Co.* v. *United States*, 449 U.S. 383, 394 n.3 (1981) (refusing to decide an issue not passed upon by the court of appeals); *Combs* v. *United States*, 408 U.S. 224, 227 n.4 (1972) (same); *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971) (same); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328 (1945) (dismissing writ of certiorari, in part, because question presented was not passed upon below); *United States* v. *Rimer*, 220 U.S. 547, 548 (1911) (dismissing writ of certiorari when closer scrutiny of the record revealed that the court below had not dealt with the issue that warranted review by certiorari).

Here, although Fifth Circuit precedent may differ from other courts of appeal addressing the internal complaints issue, the Fifth Circuit has not in this case "rendered a decision in conflict with the decision of another United States court of appeals." Supreme Court Rule 10.1.

Thus, review of the issue of whether internal complaints are protected in this case would require addressing the issue in the abstract, rather than for purposes of correcting any error in the outcome of the case below. Accordingly, resolution of

*This finding that substantial evidence supports dismissal of Mr. Hasan's complaint without reaching the internal complaint issue, which in fact was the basis of the decision below, is not raised as an issue for review in Mr. Hasan's petition, nor would it be an appropriate question for this Court's review. *Universal Camera Corp.* v. *Nat'l Labor Relations Bd.*, 340 U.S. 474, 490-91 (1951) (whether on the record there is substantial evidence to support a finding is a question for the court of appeals; the Supreme Court will intervene only in the "rare instance when the standard appears to have been misapprehended or grossly misapplied"); *Nat'l Labor Relations Bd.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-03 (1951) (same).

the internal complaints issue is better saved for a case that, in the decision below, has called for the Fifth Circuit to reach the issue and to consider it in light of the law that has developed since its 1984 decision in *Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029 (5th Cir. 1984).

CONCLUSION

For the above stated reasons, Amici respectfully request that this Court deny Petitioner's petition for writ of certiorari.

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